United States Court of Appeals

for the Second Circuit

REPLY BRIEF

75-7364

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UNITED STATES COURT OF APPEALS

For The Second Circuit

GIUSEPPE DI FORTUNATO,

Appellant,

-against-

STOCKHOLM REDERI A/B SVEA, M/V SVENSKUND,

Appellee.

REDERI A/B SATURNAS,

Third Party Plaintiff,

-against-

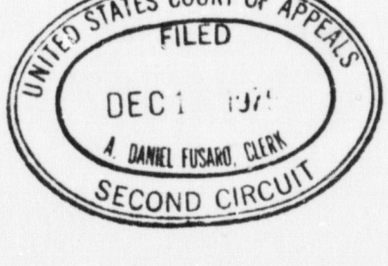
INTERNATIONAL TERMINAL OPERATING CO., INC.,

Third Party Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK

REPLY BRIEF



IRVING B. BUSHLOW
Attorney for Appellant
26 Court Street
Brooklyn, New York 11242
Tel: (212) MA 5-1336
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REPLY BRIEF FOR APPELLANT

ARGUMENT

I

(a) JUROR ALPER WAS DISQUALIFIED TO SERVE AS A JUROR BECAUSE OF BIAS AND LACK OF IMPARTIALITY, ARISING FROM HIS PRIOR EXPERIENCES, OBSERVATIONS AND FIXED AND IMMUTABLE OPINIONS - ADVERSE TO APPELLANT'S THEORIES OF LIABILITY, AND AT ODDS WITH THE COURT'S INSTRUCTIONS - CONCERNING FACTS SIMILAR TO THE CRUCIAL FACTS AT BAR, AS WELL AS CONCERNING THE CRUCIAL FACTS AT BAR THEMSELVES.

(b) APPELLANT WAS INCALCULABLY PREJUDICED BY THE FOREGOING FACTS, AS WELL AS THE ADDITIONAL FACT THAT DURING THE JURY'S DELIBERATIONS, JUROR ALPER DISCLOSED SAID EXPERIENCES, OBSERVATIONS AND FIXED AND IMMUTABLE OPINIONS TO HIS FELLOW-JURORS, AND CONVERTED THEM TO HIS VIEWS, WITH THE RESULT THAT THE VERDICT, WHICH WAS FOR APPELLEE, WAS REACHED ENTIRELY ON THE BASIS OF SAID VIEWS, AND IN TOTAL DISREGARD OF THE COURT'S INSTRUCTIONS (replying to appellee's brief, POINT III, pp. 11-15, and in further support of appellant's brief "I", pp.16-18).

(a) & (b)

It would be difficult to imagine a case in which (1) a juror was more egregiously disqualified to serve, because of bias and lack of impartiality, and (2) the disqualification was more seriously prejudicial to a party, than the present case. The proof is overwhelming: First, The evidence established - or so the jurorscould find - that the area in which appellant, DI FORTUNATO,was working at the time he slipped and fell, was littered with spilled or broken cargo (tapioca flour),

water, dunnage and broken pallets (75a-76a, 99a-100a, 101a, 24a-27a, 29a, 34a, 38a-41). DI FORTUNATO claimed that these conditions rendered the vessel unsafe and unseaworthy (10a, par. "SEVENTH", with 9a-10a), and the District Court so instructed the jury (24a-26a, 26a-27a; 33a-34a, to be read with 26a-27a), further charging them that a longshoreman does not assume the risk of an unsafe place to work or an unseaworthy condition (23a), and that the ship owner assumes the responsibility for injuries resulting from an unseaworthy condition (25a).

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* Numbers followed by an "a" refer to pages of the APPENDIX.

** that is, if the jury found that said conditions existed they could find that the vessel was unsafe and unseaworthy.

However, juror ALPER - who during World War II, while in the military service of the United States, had been attached to an embarkation unit, whose work consisted in getting materials and supplies to the Army, which in turn involved the loading and unloading of ships (78a-79a) - held the steadfast and ineradicable opinion, based upon his observations of loading and unloading operations, that the presence of spilled or borken cargo, water, dunnage and broken pallets, was not only common and usual, and to be expected, but that such conditions did not render the vessel unsafe, nor did they impose any responsibility upon the shipowner, and, moreover, longshoremen, in general, assumed any risks created by said conditions, and DI FORTUNATO, in particular, assumed any risks posed by the presence of the spilled or broken cargo, water, dunnage and broken pallets (79a). And although the District Court charged that the shipowner had the non-delegable duty to eliminate all slippery conditions "as they occur", and that "dunnage and debris shall be collected as the work progresses and be kept clear of the immediate area" (26a-27a; 33a-34a, to be read with 26a-27a), nevertheless, juror ALPER stubbornly clung to his deeply-rooted and unchangeable opinion, based upon his observations of loading and unloading operations, that it was the longshoremen who collected dunnage and debris which were present in their work areas, and kept said areas free of such conditions, and, finally, that it was the responsibility of the longshoremen to clear away such foreign substances (79a).

Furthermore, although the District Court charged that even if DI FORTUNATO was negligent in that he did not take reasonable steps to protect himself from danger, that fact did not bar his right to recover for injuries resulting from the unseaworthiness of the vessel or its gear (23a), nevertheless, juror ALPER adhered to his firm and unshakable opinion that it was the responsibility of DI FORTUNATO to clear his immediate work area of any foreign substances, such as broken or spilled cargo, water, dunnage and broken pallets, and that there was no responsibility on the part of the shipowner to do so (79a).

In addition, although the District Court instructed the jury that in determining whether or not any negligence on the part of DI FORTUNATO had contributed to the accident, they should determine whether or not DI FORTUNATO had acted as a reasonable person would have acted (27a-28a), nevertheless, juror ALPER unswervingly adhered to the view that DI FORTUNATO was responsible for clearing his immediate work area of foreign substances, and had assumed any risks posed by such substances (79a). Moreover, although the District Court charged, in connection with the matters of comparative negligence and damages, that they should determine what proportion of the accident and ensuing injuries, if any, were due to DI FORTUNATO's contributory negligence (39a, 66a), nevertheless, juror ALPER continued to espouse the view that it was the responsibility of DI FORTUNATO to eliminate unsafe conditions in his immediate work area, and that he had assumed any risks posed by such conditions (79a). Thus, juror

ALPER was necessarily of the opinion that notwithstanding whatever the evidence showed to the contrary, DI FORTUNATO was entirely responsible for the accident and his injuries.

It would be difficult to conceive of facts more irresistibly pointing to (a) the disqualification of juror ALPER to serve as a juror, because of his bias and lack of impartiality, and (b) the monumental prejudice to DI FORTUNATO resulting from the fact that juror ALPER served on the jury, and participated in its deliberations and the verdict. As the United States Supreme Court long ago wrote in a case which has since been frequently cited - namely, Reynolds v United States, 98 U.S. 145, 155:

> "Mr. Chief Justice Marshall, in Burr's Trial (1 Burr's Trial, 416), states the rule to be that 'light impressions, which may fairly be presumed to yield to the testimony that may be offered, and may leave the mind open to a fair consideration of the testimony, constitute no sufficient objection to a juror; but that those strong and deep impressions which close the mind against the testimony that may be offered in opposition to them, which will combat that testimony and resist its force, do constitute a sufficient objection to him.' The theory of the law is that a juror who has formed an opinion cannot be impartial." (emphasis supplied)

And as the Court of Appeals for the Third Circuit observed in United States v Kum Seng Seo, 300 F 2d 623, 625:

> "Traditionally this court has taken the position, even in civil cases, that verdicts would be set aside where there was evidence that the impartiality of the tribunal had been affected . . . ."

That DI FORTUNATO was seriously prejudiced by juror ALPER's serving on the jury needs no elucidation.

An evidentiary hearing is imperative, we submit. As it has been authoritatively stated:

> " '. . .if . . . jurors have knowingly misled litigants to accept them by falsely stating they could and would be fair and impartial, when in reality their minds had been previously made up, then full and proper inquiry should be made to ascertain the facts' for the purpose of ruling on a motion for a new trial. Connell v International Paper Co. (W.D. La., 1951) 97 F Supp. 440."
>
> 6A Moore's Federal Practice, 59-124, Note 3, righthand column.

As it has also been aptly observed:

> "Every losing party must be afforded a full and fair opportunity to make a showing that some intentional deception on the part of a juror . . . did in fact and law deprive such party of a fair trial."
>
> Beanland v Chicago, Rock Island and Pacific Railroad Co., 345 F Supp. 227, 232 (at "3"; D.C. W.D. Missouri, 1972).

Finally, although not necessary to this point, the prejudice to DI FORTUNATO by reason of juror ALPER's serving on the jury, was multiplied a hundredfold by the fact that during the course of the jury's deliberations, juror ALPER disclosed his experiences, observations and fixed and immutable opinions to his fellow-jurors, and converted them to his views, and, as a result, the verdict, which went against DI FORTUNATO, was reached entirely on the basis of said views, and in total disregard of the Court's instructions.

II

IT WAS ERROR FOR THE COURT BELOW TO DENY APPELLANT'S MOTION TO SET ASIDE THE VERDICT AND FOR A NEW TRIAL, WITHOUT FIRST HOLDING AN EVIDENTIARY HEARING. IN HOLDING THAT THE POST-VERDICT DISCLOSURES OF THE JURORS WERE INCOMPETENT AND INADMISSIBLE, THE DISTRICT COURT FAILED TO RECOGNIZE THAT THIS CASE COMES WITHIN THE EXCEPTION TO THE GENERAL RULE LIMITING POST-VERDICT EXAMINATION OF JURORS, WHEN IT APPEARS THAT MATTERS NOT IN EVIDENCE HAVE BEEN BROUGHT TO THE ATTENTION OF THE JURY UNDER CIRCUMSTANCES WHICH VIOLATE A PARTY'S CONSTITUTIONAL RIGHT TO BE CONFRONTED WITH THE WITNESSES AGAINST HIM. FOR THIS REASON, THE POST-VERDICT DISCLOSURES OF THE JURORS WERE COMPETENT AND ADMISSIBLE (replying to appellee's brief, POINTS I and II, pp. 6-10, 10-11, respectively, and in further support of appellant's main brief, "II", pp. 19-21).

To the authorities cited in appellant's main brief (pp. 20 and 21), we would add United States v. Kum Seng Seo, 300 F. 2d 623 (3 Cir., 1962), supra, and Stiles v. Lawrie (6 Cir.; 1954), 211 F. 2d 188.

In United States v. Kum Seng Seo, supra, a newspaper article prejudicial to the defendant had been brought to the attention of the jury during its deliberations. The Court of Appeals, citing Marshall v. United States, 360 U.S. 310, cited and discussed in appellant's main brief (pp. 20-21), set the

verdict aside, and ordered a new trial, saying:

> "Traditionally this court has taken the position, even in civil cases, that verdicts would be set aside where there was evidence that the impartiality of the tribunal had been affected or that tainted material had come before a jury."

As we said in our main brief, in referring to United States v. Marshall, supra, also involving newspaper articles prejudicial to the defendant which had been brought to the attention of the jury, we fail to perceive any distinction between newspaper articles concerning a party which are prejudicial to that party and which are clearly foreign to the issues in a case, and juror ALPER's experiences, observations and fixed and immutable opinions which were prejudicial to DI FORTUNATO, and which were equally foreign to the issues. If a new trial is required in one, as it was in both United States v. Marshall, supra, and in United States v. Kum Seng Seo, supra, consistency dictates that a new trial is required in the other - that is, in the case at bar. If newspaper articles are deemed to be "tainted material", as the Court of Appeals held in United States v. Kum Seng Seo, supra, because their contents were ex-

traneous to the issues in the case, then juror ALPER's experiences, observations and fixed and immutable opinions were also "tainted material" extraneous to the issues in the case. In United States v. Kum Seng Seo, supra, the Court of Appeals noted, and undoubtedly gave dispositive weight to, the fact that

> ". . . during the course of their deliberations, the jury had before them a printed statement from an unknown source (the newspaper article), not subjected to cross-examination or even to examination" (p.625 of 300 F. 2d ; matter in parentheses supplied).

Similarly, in the case at bar, juror ALPER's experiences, observations and fixed and immutable opinions were also brought to the attention of the jury without being "subjected to cross-examination or even to examination". That fact deprived DI FORTUNATO of his constitutional right to be confronted with the witnesses against him. In United States v. Brasco, 385 F. Supp. 966 (S.D. N.Y.; 1974), District Judge Cannella wrote as follows:

> "An exception to the general rule limiting post-verdict examination of jurors is recognized when it appears that matters not in evidence may have come to the attention of one or more jurors so as to violate the defendant's constitutional right to be confronted with the witnesses against him" (p. 968).

Similarly, the latest Standards Relating To The Administration of Criminal Justice of the American Bar Association, relating to trial by jury, state, in Section 5.7, under the heading, "Impeachment of the verdict", as follows:

> "(c) Subject to the limitations in subsection (a), a juror's testimony or affidavit shall be received when it concerns:
> (i) whether matters not in evidence came to the attention of one or more jurors, under circumstances which would violate the defendant's constitutional right to be confronted with the witnesses against him;. . . . . "
> (p. 333) *

In the case at bar, there can be no question but that juror ALPER's experiences, observations and opinions constituted matters not in evidence which came to the attention of one or more jurors, under circumstances which violated DI FORTUNATO's constitutional right to be confronted with the witnesses against him.

Finally, in Stiles v Lawrie (6 Cir., 1954), 211 F 2d 188, the court held that it was error to refuse a new trial when one of the jurors brought into the jury room a manual, not in evidence, purporting to show the length of skid marks made by automobiles travelling at various speeds.

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* The Standards were received in the Brooklyn Supreme Court Law Library on October 23rd, 1974, and would appear to have been published in that year or the preceding year. This is being written without the volume being at hand.

Similarly, in the case at bar, it was error for the court below to refuse a new trial when one of the jurors, juror ALPER, brought into the jury room, for the attention of the jury, experiences, observations and opinions, prejudicial to DI FORTUNATO, and not in evidence.

CONCLUSION

The order appealed from should be reversed, and appellant's motion to set aside the verdict, and for a new trial, should be granted, to the extent of directing that an evidentiary hearing be held, at which the jurors' post-verdict statements and disclosures should be admitted.

Respectfully submitted,

IRVING B. BUSHLOW
Attorney for Appellant

SERVICE OF 2 COPIES OF THE WITHIN

Reply Brief

IS HEREBY ADMITTED.

DATED: 12/1/75

Attorney for Appellee and 3rd Party Plaintiff

STATE OF NEW YORK
COUNTY OF NEW YORK

Edwina Taylor being duly sworn deposes and says: On December 1, 1975 I served the within ~~record on appeal~~ brief ~~appendix~~ on Alexander Ash Schwartz & Cohen the attorney for the 3rd Party Def't ~~respondent~~ by leaving ~~mailing~~ three copies thereof at his office located at 801 Second Avenue N.Y. N.Y. 10017

Edwina Taylor

Sworn to before me this day of December, 1975

Lillian Weisberg

LILLIAN WEISBERG
COMMISSIONER OF DEEDS
CITY OF NEW YORK 4-1401
Certificate filed in New York County
Commission Expires September 30, 1976